

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 7, 2017

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2015AP2365

STATE OF WISCONSIN

Cir. Ct. Nos. 2012CV1897
2012CV1898

**IN COURT OF APPEALS
DISTRICT IV**

RORY J. D. HART AND ROBERT J. ADAMS,

PLAINTIFFS-RESPONDENTS,

V.

ASFFH CORP. AND TED DERYNDA A/K/A THADEUS DERYNDA,

DEFENDANTS-APPELLANTS.

ROBERT J. ADAMS,

PLAINTIFF-RESPONDENT,

V.

ASFFH CORP. AND TED DERYNDA,

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Rock County:
MICHAEL R. FITZPATRICK, Judge. *Affirmed.*

Before Brennan, P.J., Kessler and Brash, JJ.

¶1 PER CURIAM. Rory J. D. Hart initiated an action for breach of contract against ASFFH Corp. and Ted Derynda. Robert J. Adams also commenced an action against ASFFH Corp. and Derynda. The circuit court consolidated the two cases. After a trial to the court, the circuit court ruled in favor of Hart and Adams. On appeal, Derynda argues that the promissory notes are not binding contracts because there was no legally sufficient consideration. We affirm.

¶2 “The elements of an enforceable contract are offer, acceptance, and consideration.” *Runzheimer Int’l, Ltd. v. Friedlen*, 2015 WI 45, ¶20, 362 Wis. 2d 100, 862 N.W.2d 879. “The existence of an offer and acceptance are mutual expressions of assent, and consideration is evidence of the [parties’] intent to be bound to the contract.” *Id.* (quoted source omitted). Consideration is “a detriment incurred by the promisee or a benefit received by the promisor at the request of the promisor.” *Id.*, ¶21 (quoted source omitted).

¶3 We will uphold the circuit court’s findings of fact unless they are clearly erroneous. WIS. STAT. § 805.17(2) (2015-16).¹ “When there is conflicting testimony, the circuit court is the ultimate arbiter of the witnesses’ credibility.” *Welytok v. Ziolkowski*, 2008 WI App 67, ¶28, 312 Wis. 2d 435, 752 N.W.2d 359.

¹ All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

Whether a contract is enforceable based on the facts as found by the circuit court presents a question of law. *See Star Direct, Inc. v. Dal Pra*, 2009 WI 76, ¶18, 319 Wis. 2d 274, 767 N.W.2d 898.

¶4 The circuit court made the following findings of fact. Hart and Adams were members of ASFFH, LLC, a business entity set up to produce and sell novelty foam hats. On May 15, 2009, Derynda executed an option to purchase ASFFH, LLC. On June 15, 2009, Derynda's option to purchase became effective. Derynda transferred the assets he obtained from the LLC to a new corporation he created with a similar name, ASFFH, Inc. (the "Corporation"), and gave fifteen percent of the stock in his new corporation to the LLC. The Corporation issued an installment note to the LLC for \$210,000 pursuant to the terms of the offer to purchase.

¶5 The Corporation fell behind on the payments owed to the LLC. The LLC extended the date for payment, but the Corporation was unable to make the payments. On October 27, 2011, Derynda, as CEO of the Corporation, signed new promissory notes in favor of Hart and Adams personally, rather than the LLC, to forestall litigation. Derynda personally guaranteed payment of the notes. Some subsequent payments were made, but then the Corporation and/or Derynda stopped paying the amounts due under the promissory notes. Based on these findings of fact, the circuit court ruled that the Corporation and Derynda had breached the contracts.

¶6 On appeal, Derynda argues that the promissory notes were not enforceable because neither Hart nor Adams provided or received any consideration when the promissory notes were signed on October 27, 2011. We reject this argument. When Derynda signed the promissory notes on October 27,

2011, the Corporation’s June 2009 debt was transferred from the LLC to Hart and Adams personally, and the LLC agreed not to pursue litigation or collection efforts with regard to the June 2009 contracts. The circuit court explained that it found the testimony of Hart and Adams to be credible when they said that if Derynda had not signed the promissory notes on behalf of the Corporation (which he personally guaranteed), then the LLC would have commenced legal action against the Corporation. The LLC lost the right to sue and the Corporation and Derynda, as promisors, received a benefit—the LLC agreed not to sue. This constitutes sufficient consideration to make the contract legally enforceable.

¶7 Derynda acknowledges that a third party—here, the LLC—can provide consideration for a contract between other parties—here, the contract between Hart and the Corporation, personally guaranteed by Derynda, and the contract between Adams and the Corporation, personally guaranteed by Derynda. *See Durand West, Inc. v. Milwaukee Western Bank*, 61 Wis. 2d 454, 460, 213 N.W.2d 20 (1973) (“[C]onsideration may move to the promisor or a third person, and may be given by the promisee or a third person.”) (citation omitted). Derynda contends, however, that the consideration was not legally sufficient because the LLC did not reduce the liability of the Corporation. It is irrelevant whether the parties jointly agreed to reduce the Corporation’s liability; the LLC agreed to forgo legal action, which constituted sufficient consideration. Derynda also contends that the LLC agreed only to *postpone* legal action as long as Hart and Adams were paid, rather than give up the right to legal action altogether. An agreement to postpone legal action in this situation would have constituted consideration as much as an agreement to forgo legal action altogether. More importantly, however, the circuit court found as a matter of fact that the LLC gave up its *right to legal action* to enforce the June 2009 note. Derynda has not argued

that the circuit court's finding of fact is clearly erroneous. *See* WIS. STAT. § 805.17. Therefore, we reject Derynda's arguments.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

